SUPREME COURT, U. S.

Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 393

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WAGONER TRANSPORTATION COMPANY, et al.
*Petitioners*

vs.

ARCHIE BAIRD, et al.
*Respondents*

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## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

I. Was the Sixth Circuit Court of Appeals correct in affirming the Trial Court in its finding that Respondents' transportation of Standard Oil Company products, wholly within the State of Michigan, was an intrastate hauling of inventory which had come to rest at the Muskegon, Michigan marine terminal and that Respondents were therefore not exempt from the overtime provisions of the Fair Labor Standards Act under Sec. 213(b)(1) of that Act?

II. Was the Sixth Circuit Court of Appeals correct in affirming the Trial Court in its finding that the mere existence of an unused grant of authority from the Interstate Commerce Commission did not exempt Respondents from the overtime provisions of the Fair Labor Standards Act under Sec. 213(b)(1) of that Act?

## STATEMENT OF THE CASE

This case arises under the Fair Labor Standards Act of 1938, for overtime payments which were not paid to Plaintiffs when they worked for Defendant Wagoner Transportation Company in excess of forty hours per week. All nineteen Plaintiffs were employed by Defendant as tank drivers, driving petroleum tankers for Defendant in Western Michigan (37J.A.-38J.A., T2-T3).[1]

Wagoner Transportation Company is a Muskegon, Michigan-based corporation, whose function is to deliver petroleum products from a Muskegon marine terminal owned by the American Oil Company, a wholly-owned subsidiary of Standard Oil Company of Indiana (hereinafter referred to as "Standard Oil" or "Standard"), to various points in Western Michigan and the Northern Lower Peninsula of Michigan (75J.A.-76J.A.).

All driving done by each driver and all deliveries made are exclusively within the boundaries of the State of Michigan (26J.A.-27J.A.).

Standard Oil owns and operates a refinery at Whiting, Indiana, from which it distributes its petroleum products to various terminal storage facilities, one of which is located at Muskegon, Michigan (72J.A.-73J.A., T47-T49).

When the petroleum products arrive at the Muskegon marine terminal, they are pumped from the lake tanker into one of the storage tanks located there, where the product is stored until requested by a Standard Oil customer. Once an order is received at the marine terminal, a Wagoner driver receives a load of the petroleum product requested,

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[1] Figures in parentheses followed by the letters "J.A.", i.e. 37J.A., are page numbers of the Joint Appendix filed in the Sixth Circuit Court of Appeals. Figures in parentheses preceded by "T" are parallel references to page numbers of typewritten certified transcript of the proceeding before the District Court, used in Petitioners' Petition for Certiorari.

by having it pumped from the storage tank into his truck (43J.A.-49J.A., T9-T17). Delivery is then made to the customer. At no time is delivery ever made from a tanker directly to a Wagoner truck (81J.A., T59).

Standard Oil has more than two hundred customers in the Western Michigan area it serves, all with varying requirements and needs (109J.A.-110J.A., T97-T99). Of the shipments from the Muskegon marine terminal 70% to 75% go to bulk plants and service stations (122J.A.). The remaining 25% to 30% of the products from the terminal go to other customers, such as industrial plants and schools (122J.A., T114-T115).

Standard Oil uses its Muskegon marine terminal as a terminal storage point for its petroleum products and serves Western Michigan from this point (126J.A., T119). Ships arrive at the marine terminal on a periodic basis with the objective of keeping an adequate supply of petroleum products at the terminal. This procedure was described as the same as keeping an "inventory in a store" by Standard's witness, Mr. Paul Gary, Manager of the Highway Traffic Department, who said at trial (126 J.A., T119):

> "THE COURT: So what you have got up there is an inventory, the same as you keep an inventory in a store?
>
> "THE WITNESS: That is true.
>
> "THE COURT: And you keep it there for sale for anybody whom the sales department can develop?
>
> "THE WITNESS: Right. . ."

Mr. Gary testified that Standard did not know with certainty whether a customer would be supplied petroleum products from the Muskegon terminal, the origin of shipment being subject to change even a day or two in advance of delivery based upon changed economic factors such as shipping costs. Such changes could mean changing the customer's source from the Muskegon terminal to a pipeline terminal or vice versa (125J.A.-126J.A., T118-T119).

Standard borrows or buys petroleum products from a competitor, such as Shell Oil or Pure Oil, if the Muskegon terminal does not have enough product at the time delivery was needed (127J.A., T120). This is based upon an exchange arrangement (127J.A., T120).

The marine terminal is large enough to permit the receipt of the entire contents of the ships serving it (81J.A., T59).

The annual turnover rate or "through-put" of the products held in storage at the terminal was only six (6) times the terminal's tank capacity (110J.A.-111J.A., T98-T100).

No portion of any of the products are allocated before they arrive at the Mukegon terminal (176J.A., T8). No shipment or part of a shipment can be identified as to destination or quantity until it leaves the Muskegon marine terminal (176J.A., T8). Once a request for a delivery is received at the Muskegon marine terminal, delivery is then made from the petroleum products in storage at the terminal 174J.A., T6).

All deliveries made by the Wagoner drivers were to purchasers entirely within the State of Michigan. The State of Michigan, through the Michigan Public Service Commission, has been actively engaged in the regulation of the subject transportation as intrastate commerce (26J.A.-27J.A.). None of the Wagoner drivers, during the period in question, operated a vehicle on a route authorized by the Interstate Commerce Commission (25J.A.-27J.A.). Instead, all drivers operated solely on routes granted to Wagoner by the Michigan Public Service Commission, which routes were entirely within the State of Michigan 25J.A.-27J.A.).

Wagoner did possess an Interstate Common Carrier Certificate from the Interstate Commerce Commission (25J.A., 204J.A.-205J.A.) but the certificate is unrelated to the transportation involved. No operations have been performed under this interstate certificate for at least ten years (25

J.A., 128J.A., T122; 147J.A., T146-T147; 157 J.A.-159J.A., T160-T161).

Tax receipts from the Muskegon City Treasurer's office showed that Standard Oil had consistently paid a personal property tax on an agreed valuation of the petroleum products in the Muskegon marine terminal (168J.A.-169J.A., T173-T174; 195J.A.-197J.A.).

## REASONS FOR DENYING THE WRIT

### 1. The Decision Below is in Accordance With Decisions of Other Courts of Appeals and This Court.

Petitioners' main thrust in seeking to have this Court grant a Petition for a Writ of Certiorari is the contention that the decision of the Sixth Circuit Court of Appeals in this case is in conflict with other courts of Appeals.

That position is patently without basis.

Instead of being in conflict, the Sixth Circuit's opinion is in full accord with the other Courts of Appeals. Further, the Sixth Circuit carefully followed the legal and factual tests set forth by this Court.

The key determination in each case involving the issue of interstate or intrastate activity under Section 13(b)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. Sec. 213(b)(1), is one of fact. This was most recently restated by the Fifth Circuit in *Galbreath v. Gulf Corporation*, 413 F. 2d 941 (5th Cir. 1969), at page 945:

> "Preliminarily, we note that questions of 'movement, cessation of movement" are factual. *Kline v. Wirtz*, 373 F. 2d 281 (5th Cir. 1967) . . . .".

The Sixth Circuit carefully analyzed the following undisputed facts hereafter set forth in summary form.

1. Standard knew the customers ultimately to be served by a shipment, but the "specific quantity" to be shipped

to a given destination was not fixed at the time of shipment (19a-20a). [2]

2. The Muskegon terminal was properly characterized as a "local marketing facility" insofar as the "throughput" of the petroleum products was only six times the storage capacity and the goods at the terminal were "inventory in-store for actual orders to be placed by Standard's customers." (20a)

3. No final transportation arrangements were made until after the petroleum products were inventoried at Muskegon. Actual orders, not forecasts, were used as the basis for "allocation from storage." (20a).

In short, the Sixth Circuit found, as did the District Court, *as a matter of fact*, that Standard in this case did not have a fixed intent of continuous movement for the petroleum products. Instead, the facts established the Muskegon terminal as a *local, intrastate* marketing and distribution point for products that had come to rest.

Significantly, the Sixth Circuit in its opinion expressly reviewed the very cases Petitioners here contend conflict. It said at 20a-21a:

> "The four cases relied upon by Appellants are distinguishable. *Wirtz v. Lunsford*, 404 F. 2d 693 (6th Cir. 1969), *Galbreath v. Gulf Oil Corporation*, 413 F. 2d 941 (5th Cir. 1969), *Shew v. Southland Corporation*, 370 F. 2d 376 (5th Cir. 1966), and *North Carolina Utilities Commission v. United States*, 253 F. Supp. 930 (E.D. N.C. 1966).
>
> *None of these cases involves the combination of intrastate factors involved in the instant case.* It must be noted that in the instant case forecasts, not actual orders by customers, were the basis of the shipments of petroleum products from Whiting, Indiana, to Mus-

[2] References to the Sixth Circuit opinion in this case will be to the opinion as printed in Appendix B of the Petition for Writ of Certiorari.

> kegon, Michigan. Further, such forecasts merely reflected the anticipations of customers' needs because Standard had not entered into "requirements contracts" or "specific quantity" arrangements before shipping to the Muskegon terminal. Also, Standard's occasional need to buy or borrow petroleum from nearby competitors to fill customers' orders indicates the "inventory" status of the goods at the terminal. Finally, the low "through-put" of the Muskegon terminal suggests that the products stored there "come to rest" before being delivered to Wagoner's drivers for transportation wholly within Michigan." (Emphasis added.)

The *Galbreath* case, primarily relied upon by Petitioners, involved a completely different factual situation than did the instant case. These critical factual differences were summarized by the Sixth Circuit at 21a:

> "In *Galbreath v. Gulf Oil, supra*, 413 F.2d 941 (5th Cir. 1969), the United States Court of Appeals for the Fifth Circuit found when Gulf Oil Company shipped its products from out of state it had a fixed and persisting intent to transport beyond the bulk plant on the "basis of contractual commitments with customers." Shipments were "predetermined" and products were shipped on a 7-10 day cycle with no more than 15 days storage supply held in the bulk plant at any one time. These facts are inapposite to the instant action in which the specific quantities of customer orders were not "predetermined" and the terminal was used more in the nature of a storage or inventory facility."

The Sixth Circuit similarly pointed out the decisive fact differences in *Shew v. Southland Corporation*, supra, and *North Carolina Utilities Commission v. United States*, supra, at 21a-22a:

> "Similarly, reliance upon *North Carolina Utilities Commission v. United States, Supra*, 253 F.Supp. 930, and *Shew v. Southland Corporation, Supra*, 370 F.2d

376 (5th Cir. 1966), is misplaced because these two cases involved shipments made with a fixed intent of continuous movement, 253 F.2d at 936, or "pursuant to pre-existing orders," 370 F.2d at 380, and remained in the terminal facilities or storage area for "not more than three days," 253 F.Supp. at 936, or "less," 370 F.2d at 380. Unlike the procedures at Muskegon, the products were not held in storage or inventory pending the receipt of actual orders."

The fourth case relied on by Petitioners is *Wirtz v. Lunsford*, 404 F. 2d 693 (6th Cir. 1968). That case involved the issue of coverage under the Fair Labor Standards Act, which was conceded by Petitioners in this case. The Sixth Circuit properly pointed out that it never reached the issue of the scope of "interstate commerce" under the Carrier Act, 49 U.S.C. Sec. 301, et. seq. (MCA) (21a).

Petitioners, at pages 11-12 of the Petition, assert that the Sixth Circuit in this case was in conflict with *Galbreath* in distinguishing as to the meaning of "interstate commerce" for the purposes of the FLSA and the purposes of the MCA. Petitioners' claim of conflict is wrong. The Fifth Circuit made the *identical* analysis at page 944 where it said:

> "If the Interstate Commerce Commission has the power under the MCA to establish safety requirements, including maximum hours of employees, with respect to the plaintiffs in this case, then plaintiffs fall within the MCA exemption to the FLSA and are not entitled to overtime compensation. Section 207 of the FLSA providing for overtime pay covers employees "engaged in commerce or in the production of goods for commerce." *This coverage is broader than that in the Section 213(b)(1), Motor Carrier Act exemption where the employee himself must be engaged in interstate transportation.* Walling v. DeSoto Creamery and Produce Co., 51 F.Supp. 938, 3 WH Cases 395 (D Minn. 1943). . . ." (Emphasis added.)

Petitioners also assert that the Sixth Circuit opinion on this point conflicts with the Eighth Circuit in *Walling*

*v. Mutual Wholesale Food & Supply Company*, 141 F.2d 331 (8th Cir. 1944), and *Beggs v. Kroger Company*, 167 F. 2d 700 (8th Cir. 1948). Neither case conflicts with the Sixth Circuit decision. The Court in both decisions found *as matters of fact* that the activity involved met the interstate tests of the MCA, as well as of the FLSA. This case involved solely the issue of interstate commerce under the MCA.

Petitioners also state that the Sixth Circuit in this case did not refer to the three types of movements set forth in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943) as did the Fifth Circuit in *Galbreath*. Petitioners concede that the Sixth Circuit explicitly enumerated those movements in *Allesandro v. C. F. Smith Co.*, 136 F.2d 75 (6th Cir. 1943). (Petition, pp. 9-10.)

Although specific reference was not made in this case to *Jacksonville Paper*, the Sixth Circuit's detailed anaylsis of the facts make it clear that the third category of movement described by it in *Allesandro* was involved in this case, i.e.:

> 3) Goods based upon anticipation of the needs of specific customers, rather than upon prior orders or contracts.

Such movement is intrastate in nature.

This fact determination of intrastate commerce made by the Sixth Circuit was in complete accord with the criteria established by the Interstate Commerce Commission in Ex Parte No. MC-48, 71 MCC 17 (1957) as incorporated into the interpretive Bulletin of the Wage and Hour Division, U.S. Department of Labor, outlining the scope of the 13(b)(1) exemption to the FLSA, 29 Code of Federal Regulations, Sec 782.7(b)(2): Both the Sixth Circuit and the District Court gave these long-followed, consistent agency determinations "great weight." (See 19a.)

Petitioners also attempt to claim a conflict between the instant case and the holding of this Court in *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231 (1951). No conflict is involved. Instead, the *Federal Trade Commission* case involved the concept of interstate commerce under the *Robinson-Patman Act*, rather than

such concept under the FLSA or MCA? Significantly, the United States District Court for the Eastern District of Michigan in the case of *Daly v. Citrin*, 53 F.Supp. 876. (E.D. Mich. 1943), dealt with an identical fact situation under the FLSA and found that the interstate movement of the petroleum products ended when they reached the tanks of the marine terminal. That decision is fully consistent with the instant case.

See also *Atlantic Coast Line R. Co. v. Standard Oil Co. of New Jersey*, 12 F.2d 541 (4th Cir. 1926), cert. denied. 273 U.S. 712 (1926).

Finally, Petitioners contend that the mere possession of a dormant Interstate Certificate of Public Convenience and necessity over unused and unrelated routes gave the Interstate Commerce Commission power over its employees and therefore exempted them under Section 213(b)(1) of the FLSA.

The Sixth Circuit directly answered that contention citing the clear holdings of this Court as follows at 22a;

> ". . . The power of the Interstate Commerce Commission to exercise jurisdiction over a carrier's employees is limited to "activities [which] directly affect the safety of operation . . . in interstate . . . commerce." *Levinson v. Spector Motor Co.*, 330 U.S. 649, 671 (1947); *Pyramid Motor Corp. v. Ispass*, 330 U.S. 695, 708 (1947); *United States v. American Trucking Assns.*, 310 U.S. 534, 553 (1940)."

It is undisputed that none of the drivers in this case operated on a route authorized by the I.C.C. All drivers operated solely on routes granted and regulated by the Michigan Public Service Commission, entirely within the State of Michigan (25J.A.-27J.A.).

Petitioners assert that the Sixth Circuit decision, in following the authority of this Court, is in conflict with *Starrett v. Bruce*, 391 F.2d 320 (10th Cir. 1968); cert. den. 393 U.S. 971 (1968), and *General Transportation Co. v. U. S.*, 65 F.Supp. 981 (D.C. Mass. 1946), affirmed per curiam, 329 U.S. 668 (1946).

In fact, the Sixth Circuit cited *Starrett* as well as *Goldberg v. Faber Industries,* 291 F.2d 232 (7th Cir. 1961), in support of its holding (22a). *Starrett* involved a carrier which derived two per cent of its revenues from interstate transportation, although it did not actually transport goods in interstate commerce during the ten months that Starrett was employed. That case does not hold or imply that the ICC has authority over a carrier's drivers, when the carrier has not performed *any* interstate activities for at least ten years. The Seventh Circuit in *Goldberg v. Faber Industries* upheld the requirement of *actual* interstate activity by an employee for the exemption to apply.

Again, the utter lack of a *factual* basis by Petitioners to claim interstate activity flatly refutes their position.

The case of *General Transportation Co. v. U. S.*, does not involve drivers at all. It simply holds that certain aspects of the ICC's authority, such as the transfer of certificates, may exist if revocation procedures were not followed.

As reviewed in this brief, the Sixth Circuit opinion in this case is in accord with and not in conflict with the decisions of other Courts of Appeals and the holdings of this Court. Therefore, there is no basis to grant certiorari.

### 2. The Decision Below Does Not Raise Significant and Recurring Problems.

The Sixth Circuit in this case carefully analyzed the facts found by the District Court and affirmed the lower court's determination that the activity of the 19 drivers involved was *intrastate* in nature. Therefore, the exemption under Section 213(b)(1) of the Fair Labor Standards Act was held not to apply.

The determination of whether the activity involved is interstate or intrastate is essentially one of fact. The holdings of this Court, as well as of the other Courts of Appeals, were reviewed and followed. Basically, Peti-

tioners object to the findings of fact, although the proofs were primarily uncontroverted.

Therefore, Petitioners' contentions are without merit that conflicts will arise in the circuits as to compensation and applicability of safety regulations as a result of this Opinion. On the contrary, the Opinion reiterates the long standing approach in these cases that the questions of interstate or intrastate activity under the FLSA must be decided on the merits of the precise facts established in each case. Such determinations have preserved the flexibility of the transportation systems involved in accord with the intent of Congress as expressed in the Fair Labor Standards Act and the Motor Carrier Act.

## CONCLUSION

For the reasons set forth herein, a writ of certiorari should not issue to review the judgment against Petitioners and the opinion of the Sixth Circuit in this case.

Respectfully submitted,

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